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United States Court of Appeals
FOR THE NINTH CIRCUIT

C. J. Montag & Sons, Inc., et al, *Appellees-Appellants,* vs. International Brotherhood of Carpenters and Joiners of America, et al, *Appellants-Appellees.*	No. 18875
Holman Erection Company, Inc., *Appellee,* vs. International Brotherhood of Carpenters and Joiners of America, et al, *Appellants.*	No. 18876
Curtis Construction Co., a corporation *Appellee,* vs. International Brotherhood of Carpenters and Joiners of America, et al, *Appellants.*	No. 18877

Appeal from the United States District Court for the Eastern District of Washington, Southern Division
Honorable William J. Lindberg, *Judge*

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APPELLANTS' BRIEF

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United States Court of Appeals
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C. J. MONTAG & SONS, INC., et al, HOLMAN ERECTION COMPANY, INC., CURTIS CONSTRUCTION CO., *Appellees,* vs. INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, et al, *Appellants.*	No. 18875 No. 18876 No. 18877

Appeal from the United States District Court for the Eastern District of Washington, Southern Division
HONORABLE WILLIAM J. LINDBERG, *Judge*

APPELLANTS' BRIEF

STATEMENT AS TO JURISDICTION

This is a consolidated brief.

In case No. 18875 the appellees are C. J. Montag & Sons, Inc., a corporation, Carl M. Halvorson, Inc., a corporation, Austin Construction Company, a corporation, Babler Bros., Inc., a corporation, and McLaughlin, Inc., a corporation. The contractors constituting the appellee in this numbered case were joint venture contractors and will be referred to in this brief as "Montag."

In case No. 18876 Holman Erection Company, Inc., a corporation, will be referred to in this brief as "Holman."

In case No. 18877 Curtis Construction Company, a corporation, will be referred to as "Curtis."

When the actions were commenced in the United States District Court the appellants included the Washington State Council of Carpenters and the Columbia River Valley District Council of Carpenters, but these two appellants having been dismissed from the action, the appellants in all three cases are now the International Brotherhood of Carpenters and Joiners of America (AFL-CIO) and Carpenters Local 1849 of the United Brotherhood of Carpenters and Joiners of America located at Pasco, Washington. Hereafter these two appellants will be referred to as the "International" and as "Local 1849."

References to the Clerk's Transcript will be references to "CT." References to the Reporter's Transcripts will be references to "RT."

There are three separate Clerk's Transcripts of record for each of the consolidated cases, while there is one Reporter's Transcript covering all of the three cases. This was so because the cases were all tried together in accord with the identical charges made by each of the appellees.

Note should be taken of the following facts. Although all of the actions were commenced late in 1957, their ultimate determination was delayed. The untimely death of Judge Driver in the late summer of 1958 resulted in a vacancy on the bench which was not filled until about a year later in 1959. The appointee and present judge of the United States Dis-

trict Court for the Eastern District of Washington, Honorable Charles L. Powell, felt that he was disqualified by reasons of relationship, and consequently all hearings on matters involved were undertaken by the Honorable William J. Lindberg of Seattle, Washington. Because of the geographical difficulties, the Court being in Seattle, and counsel being located in Spokane, Washington, Portland, Oregon, and Absarokee, Montana, various hearings were held and testimony taken at Yakima, Seattle and Spokane.

Appellee Montag commenced an action against appellants International and Local 1849 on October 11, 1957 under Section 303 of the Labor Management Relations Act of 1947, 29 U.S.C.A., Section 187, hereafter referred to as the "Act." Montag alleged that while it was engaged in the construction of a dam on the Snake River under contract with the United States, involving navigation, flood control and power, near Pasco, Washington, which involved use of over seventeen million dollars ($17,000,000.00) of materials, etc. one-half of which came from out of state, the appellants engaged in and induced and encouraged the employees of appellee on the Ice Harbor Dam project, and the employees of other employers to engage in a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities of the appellee, or to perform any services for the appellee. Montag alleged that an object in the activities of the appellants was to force and to require Montag to assign the work of the rigging of forms to the members of the appellant Lo-

cal 1849, rather than to other persons of a different labor organization, particularly to members of the International Association of Bridge, Structural, Ornamental Iron and Reinforced Steel Workers Union Local No. 14, hereafter Iron Workers No. 14, to whom Montag had assigned such work. It was alleged that none of the appellants had been certified by the National Labor Relations Board as the bargaining agent or representative for employees performing the work assigned by the appellee, and that the direct result of the actions of the appellants was to close down the construction work (there was no picketing) and that as the result Montag suffered damages in excess of one-half million dollars. (See No. 18875, CT pp 1-5 incl., increased later to $572,313.18, R.T. 206.)

In No. 18876 Holman filed its complaint on November 4, 1957, asserting its claim in the same fashion and under the same statute as Montag. Holman was a subcontractor having entered into a contract with the prime contractor, Montag, and it claimed damages of approximately $75,000.00 (See No. 18876, CT 1-5 incl.)

In No. 18877 Curtis sued the appellants and filed its action on December 6, 1957, invoking the same statutory authority (29 U.S.C.A., Sec. 187) as had been set out by Montag and Holman. Curtis was also a subcontractor on the building of the Ice Harbor Dam. Curtis claimed damages in the sum of approximately $165,000.00. (See No. 18877, CT 1-4 incl.)

The three appellees sought approximately $35,000.00 in attorneys' fees, plus costs.

By way of pleading to the claim of Montag in No. 18875 appellants denied the claims of Montag and alleged that if the construction work of Montag was suspended it was due to the fact that Montag summarily discharged the carpenter employees who were members of Local 1849 and of the International Brotherhood. Appellants also cross-complained against Montag and invoked the provisions of the Labor Management Relations Act of 1947, particularly Section 301, 29 U.S.C.A., Sec. 185, claiming a breach of contract by Montag. Appellants alleged that Montag, appellee, and appellants were parties to a "plan for settling jurisdictional disputes nationally and locally" and that such a system and plan provided for arbitration of jurisdictional controversies by the "National Joint Board for the Settlement of Jurisdictional Disputes." Appellants in the cross-complaint alleged that the appellee Montag and appellants were also bound by the "Carpenter Agreement for Building, Highway and Heavy Construction Covering Eastern Washington, Northern Idaho," which provided in essence that the procedure of the National Joint Board for Settlement of Jurisdictional Disputes should govern; and that Montag violated the agreement by failing to comply with the procedures and assign the work to the Carpenters Union in accord with the established practice in the area where the construction was commenced and was in progress. Appellants likewise asserted that Montag had refused and was refusing to comply with a lawful decision, order and directive promulgated after hearing by the National Joint Board for the Settlement of Jurisdictional Disputes which ordered the

assignment of certain disputed work to the appellants. It was the position of appellants that both parties having agreed to submit the dispute to the National Joint Board, and having thereafter submitted it, that both parties were bound by the decision and that the appellee Montag breached its contract with the appellants when it refused to comply with the order of the National Joint Board. It was claimed by appellants that certain sums were due by virtue of Montag's breach of the agreement. (See No. 18875, CT 10-19 incl.)

In No. 18876 (Holman) and No. 18877 (Curtis), the appellants denied the allegations of the claims of those appellees, and asserted that if the claimants were forced to suspend construction work then it was not due to any action of the appellants, but was due to the failure of appellee Montag to comply with the provisions of the agreements in force between Montag and appellants, and that in any event appellants did not violate any statutory proscription. (See No. 18876, CT 9-12 incl.; see No. 18877, CT 11-14 incl.)

In No. 18875 judgment was entered in favor of Montag and against the appellants on February 19, 1963, in the sum of $164,527.55. (See No. 18875, CT 73-74 incl.) Following post trial motions the court entered its order denying the motions and amending a supplemental conclusion of law on May 1, 1963. (See No. 18875, CT p. 83.) An appeal from that judgment was taken on May 31, 1963. (See No. 18875, CT p. 84.)

In Holman, No. 18876, the court entered judgment for the appellants and against Holman, and dismissed

the action without any award of damages on February 20, 1963. (See No. 18876, CT 32-33.) On May 1, 1963 the court signed and filed an amended judgment awarding Holman damages of $10,000.00 against appellants. (See No. 18876, CT 38-39). On May 31, 1963 appellants took an appeal from that judgment. (See No. 18876, CT p. 40.)

In Curtis, No. 18877, the court entered judgment on behalf of Curtis in the sum of $42,877.92 on February 19, 1963. (See No. 18877, CT 46-47.) On May 1, 1963 the court denied all post trial motions, and on May 31, 1963 appellants took an appeal from the judgment of the court. (See No. 18877, CT 53-54.)

The appellate jurisdiction derives from 28 U.S.C.A., Sec. 1291, which provides that:

> "The Courts of Appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States * * * * * * * * *."

STATEMENT OF THE CASE

Following a number of conferences and substantial work on a series of proposed pretrial orders, agreement was reached on what might be termed a "master" pretrial order, which is set out in full in the Appendix. (See pp. 65 Appendix.) Likewise, this particular pretrial order is found in case No. 18875, Montag, at pages 24 to 37, Clerk's Transcript.

Similar pretrial orders, with no substantial variance, except as dictated by reason of the position of the claimants (the subcontractors) are found in Hol-

man No. 18876, pp. 13 to 21, Clerk's Transcript, and in Curtis No. 18877, pp. 16 to 23, Clerk's Transcript.

All of the orders were agreed pretrial orders on liability issues. The further pretrial orders on remaining issues which referred essentially to damages may be found as follows: In Montag, case No. 18875, at pages 62 to 67 of the Clerk's Transcript; in Holman, case No. 18876, no further pretrial order was made; in Curtis, No. 18877, pages 39-42 of the Clerk's Transcript.

In this statement substantial emphasis will be deferred for argument on exhibit 4, deposition of H. H. Brown, exhibit 5, deposition of L. J. Hiller, exhibit 6, deposition of W. H. Hankins, exhibit 7, deposition of George Holland, exhibit 8, deposition of Sam Pickel, and exhibit 9, deposition of Richard James Mitchell.

Pages 1 to 188 of the Reporter's Transcript deal in great measure with the question of agency between the International and Local 1849. The balance of the Reporter's Transcript deals almost exclusively with the proofs of damage and the evidence opposed thereto; that part of the Reporter's Transcript also includes certain memorandums by the court on the post trial motions.

Facts agreed upon in the pretrial order may be related as follows: All of the appellees, Montag, Holman and Curtis, brought their actions under Section 303(b) of the Labor Management Relations Act of 1947, 29 U.S.C.A., Sec. 187(b). They claimed that appellants violated that Act in inducing and encour-

aging the employees of appellee, Montag, to engage in a concerted refusal to perform services for Montag, otherwise termed a strike, the object of which was to force and require Montag to assign the rigging of wooden forms to members of the appellants, rather than to members of the Iron Workers Local 14 to whom the employer Montag had assigned such rigging work. As previously referred to in the Jurisdictional Statement, the appellants on their side sought enforcement of an award made to them by the National Joint Board.

All parties agreed on a definition of the terms, referring to the various parties, etc. (See Appendix, pp. 67.)

All of the corporations, i.e. Montag (includes all corporations in the joint venture), Holman and Curtis were qualified to do business in the State of Washington, and all of them were engaged in construction work at the time of the acts complained of.

Montag and the others in that joint venture, by a contract dated January 4, 1957, were engaged in the construction of a dam on the Snake River in Walla Walla County in the State of Washington, which we shall refer to as the Ice Harbor Dam project. This construction work was being performed for the United States, Department of the Army Corps of Engineers, pursuant to a contract between Montag and the United States, Department of the Army Corps of Engineers, No. DA-45-164-CIVENG-57-62. The Snake River is a navigable river and a part of the Columbia River System. Construc-

tion of the Ice Harbor Dam was and is a part of a comprehensive plan for the development of the Columbia River and tributaries in the States of Montana, Idaho, Washington and Oregon in the control of floods, the increase of navigation and the production of electrical power for industrial and domestic uses in the states. The construction was commenced on or about January 28, 1957, and was completed in the month of February 1959. Appellees during the construction used materials, equipment and supplies in a minimum aggregate amount of seventeen million dollars ($17,000,000.00) of which more than fifty percent was purchased outside of the State of Washington and brought to the Ice Harbor Dam for use.

The International Union (Carpenters) was a labor organization generally engaged in representing and acting for members in local unions in the State of Washington, and in other states and territories of the United States, while Local 1849 (Carpenters) was and is a labor organization which was chartered and affiliated with the defendant International, having its headquarters in Pasco, Washington, and it was engaged in representing its members in and about that city.

During the controversy and any time material in these facts there was no order or certification of the National Labor Relations Board which determined the bargaining representative for employees who were performing rigging work at the Ice Harbor Dam project, the rigging work being the subject of controversy, as will later appear. After commencement of the work,

and on or about April 26, 1957, Montag assigned the work of rigging certain forms, including both metal and wood forms on multipurpose cranes, to the members of the Iron Workers Local No. 14. Montag based its assignment to Local 14 on what it claimed was the result of written replies to inquiries which it addressed to contractors and other major dam projects in the Pacific Northwest. Montag took the position that these inquiries, and the answers thereto, supported their assignment and that it was in accord with Montag's construction of the procedural rules and regulations of the National Joint Board for the Settlement of Jurisdictional Disputes, Building and Construction Industry. (See exhibit 3.)

Appellants objected to the position taken and assignment made by Montag. It was the Carpenters' contention that under the "Carpenter Agreement for Building, Highway and Heavy Construction Covering Eastern Washington and Northern Idaho, 1956-1957-1958" to which Montag and the appellants were parties, that the appropriate precedent under the same "Procedural Rules and Regulations of the National Joint Board . . ." invoked by Montag called for the area practice, and that the practice followed by the contractors in the area of the Local and at the "Hanford Project" (plutonium production) required that Montag assign the rigging work to appellants' people. (See exhibit 1, 3.)

Thereafter on or about June 6, 1957 the members of Local 1849, Carpenters employed by Montag refused in the course of their employment to work on

or handle the wooden forms after the same had been rigged by members of Local 14, and again on or about September 10, 1957, the members of Local 1849 employed by Montag again refused in the course of their employment to work on or otherwise handle wooden forms that had been rigged by members of Local 14 Iron Workers. The object of the refusal was to require Montag to assign certain rigging work to members of Local 1849 rather than to members of Local 14 Iron Workers. The Local 1849 acted in concert and had the object of securing the work of rigging forms for the Carpenters Local 1849. As a result of the refusal of the defendant Local 1849, the construction work on the project was halted on two occasions, from June 6 to June 22, 1957, and from September 10 to September 26, 1957. It was the contention of the appellees, which was denied by the appellants, that the refusal of Local 1849 and its members to work on the wooden forms continued throughout the periods.

Thereafter Montag and appellants submitted the question of the dispute to the National Joint Board for the Settlement of Jurisdictional Disputes, and that Board undertook to resolve the dispute pursuant to Article X of the Contract (see exhibit 1; also see exhibits 2 and 3.)

On November 27, 1957 the National Joint Board, following hearings, issued a decision as follows:

> "The hooking on, handling and signalling of all wooden forms shall be assigned to Carpenters. In other respects there is no basis to change the contractors' assignment. However, when not working on, hooking on, handling and signalling

> operations the trade shall proceed with other work as assigned by the contractor."

At this time Montag had assigned the rigging work, including rigging wooden forms, to the Iron Workers and admits that it refused to follow the Joint Board and that it made no change in such assignment, and continued to refuse to accede to the order of the Joint Board right on through to the completion of the job itself.

This recitation of agreed facts is applicable to the three cases before the court. All of the pretrial orders in the respective cases present the same circumstances and facts appropriate to the ultimate determination of liability under the sections of the Act invoked by all three appellees. (See pp. 65 Appendix; Montag, No. 18875, CT 24-37; Holman No. 18876, CT 13-21; Curtis No. 18877, CT 16-23.)

In Montag No. 18875, the findings on agreed facts entered by the court were precisely in accord with the agreed facts in the pretrial order, and were likewise precisely in accord with the agreed facts in the pretrial orders in the other two cases, to-wit, Holman No. 18876 and Curtis No. 18877. In all of the cases the court concluded from the agreed facts that:

> "2. Defendants' conduct violates Sec. 303(a)(4) of the Labor-Management Relations Act, 1947, and is actionable under Sec. 303(b) thereof, and said defendants are liable to plaintiffs for damages caused thereby." (In Montag No. 18875, CT 53-61; in Holman No. 18876, CT 22-28; in Curtis No. 18877 CT 24-29.)

These cases having been tried first as to liability issue, and second as to damages, resulted after hearing on claims of damages in the judgments heretofore referred to.

Appellants urge that their acts and conduct as detailed in the pretrial order, and in the findings of fact, did not violate Sec. 303(a)(4) of the Labor-Management Relations Act of 1947, 29 U.S.C.A. Sec. 187(a)(4) and were not actionable under Sec. 303(b) 29 U.S.C.A. Sec. 187(b); that no active jurisdictional dispute existed between the appellants and Iron Workers Local 14, or any other union or group of employees, because the dispute was wholly between the appellee employer Montag and the appellants; that appellants claimed the allocation of work in accord with contract and practice which appellee Montag denied in making its allocation for its economic self-interest. Appellants contend that such a dispute is not cognizable under the statutory section invoked by appellees, unless in fact the appellants were in an active dispute with another union.

SPECIFICATION OF ERRORS

(a) Montag, No. 18875:

1. Acts and conduct of appellants did not violate Section 303(a)(4) of the Labor-Management Relations Act of 1947, as amended, and was and is not actionable under Section 303(b) thereof.

2. The Court erred in law in concluding that a jurisdictional dispute existed and was present between the appellants and the Iron Workers Union as con-

templated and provided in Section 303(a)(4) of the Labor Management Relations Act of 1947, as amended.

3. The Court erred in law in concluding that there was an actionable dispute involving appellants within the meaning of the Act, because the dispute was not of prohibited jurisdictional character. The dispute was between the appellee employer and appellants about the allocation of work, there being no active jurisdictional dispute between the appellants and any other union or group of employees.

4. The appellants were entitled by contract agreement with appellees to certain work, which appellees refused to assign to them, in breach of the contract; and the refusal of appellants to continue working did not constitute conduct by appellants prohibited by Section 303(a)(4) of the Act.

5. The Court erred in not holding and concluding that appellants had proved substantial damages as a result of a breach of contract by the appellees, and in not holding and concluding that appellants were entitled to damages against appellees in the sum of not less than $40,000.00.

6. The Court erred in holding and concluding that the appellant International Brotherhood of Carpenters and Joiners of America was and is liable for the acts of appellant Local 1849, United Brotherhood of Carpenters and Joiners, for the reason that appellees did not prove, nor does the evidence justify the holding and conclusion that the appellant International Brotherhood participated with said Local in the ac-

tions of appellant Local 1849 claimed by appellees to have violated Section 303(a)(4) of the Labor Management Relations Act of 1947, as amended.

7. The Court erred in holding that appellees suffered damages of $164,527.55, and in entering judgment for appellees against appellants in the sum of $164,527.55.

SPECIFICATION OF ERRORS

(b) Holman, No. 18876:

1. Acts and conduct of appellants did not violate Section 303(a)(4) of the Labor Management Relations Act of 1947, as amended, and was and is not actionable under Section 303(b) thereof.

2. The Court erred in law in concluding that a jurisdictional dispute existed and was present between the appellants and the Iron Workers Union as contemplated and provided in Section 303(a)(4) of the Labor Management Relations Act of 1947, as amended.

3. The Court erred in law in concluding that there was an actionable dispute involving appellants within the meaning of the Act, because the dispute was not of prohibited jurisdictional character. The dispute was between the appellee employer (prime contract) and appellants about the allocation of work, there being no active jurisdictional dispute between the appellants and any other union or group of employees. Appellee sub-contractor here cannot prevail because prime contractor Montag et al cannot prevail.

4. The appellants were entitled by contract agreement with appellee (prime contractor) to certain work, which appellee (prime contractor) refused to assign to them, in breach of the contract; and the refusal of appellants to continue working did not constitute conduct by appellants prohibited by Section 303(a)(4) of the Act.

5. Appellee sub-contractor here is relegated to same position as primary contractor Montag et al, and is barred from recovery by reason of paragraphs 1, 2, 3, 4, supra.

6. The Court erred in holding and concluding that the appellant International Brotherhood of Carpenters and Joiners of America was and is liable for the acts of appellant Local 1849, United Brotherhood of Carpenters and Joiners, for the reason that appellee did not prove, nor does the evidence justify the holding and conclusion that the appellant International Brotherhood participated with said Local in the actions of appellant Local 1849 claimed by appellee to have violated Section 303(a)(4) of the Labor Management Relations Act of 1947, as amended.

7. The Court erred in holding that appellee suffered damages of $10,000.00, and in entering judgment for appellee against appellants in the sum of $10,000.00.

SPECIFICATION OF ERRORS

(c) Curtis, No. 18877:

1. Acts and conduct of appellants did not violate Section 303(a)(4) of the Labor Management Relations Act of 1947, as amended, and was and is not ac-

tionable under Section 303(b) thereof.

2. The Court erred in law in concluding that a jurisdictional dispute existed and was present between the appellants and the Iron Workers Union as contemplated and provided in Section 303(a)(4) of the Labor Management Relations Act of 1947, as amended.

3. The Court erred in law in concluding that there was an actionable dispute involving appellants within the meaning of the Act, because the dispute was not of prohibited jurisdictional character. The dispute was between the appellee employer (prime contractor) and appellants about the allocation of work, there being no active jurisdictional dispute between the appellants and any other union or group of employees. Appellee sub-contractor here cannot prevail because prime contractor Montag et al cannot prevail.

4. The appellants were entitled by contract agreement with appellee (prime contractor) to certain work, which appellee (prime contractor) refused to assign to them, in breach of the contract; and the refusal of appellants to continue working did not constitute conduct by appellants prohibited by Section 303(a)(4) of the Act.

5. Appellee sub-contractor here is relegated to same position as primary contractor Montag et al, and is barred from recovery by reason of paragraphs 1, 2, 3, 4, supra.

6. The Court erred in holding and concluding that the appellant International Brotherhood of Carpenters and Joiners of America was and is liable for the

acts of appellant Local 1849, United Brotherhood of Carpenters and Joiners, for the reason that appellee did not prove, nor does the evidence justify the holding and conclusion that the appellant International Brotherhood participated with said Local in the actions of appellant Local 1849 claimed by appellee to have violated Section 303(a)(4) of the Labor Management Relations Act of 1947, as amended.

7. The Court erred in holding that appellee suffered damages of $42,877.92, and in entering judgment for appellee against the appellants in the sum of $42,877.92.

ARGUMENT

(a) The appellants are not liable for damages because they did not engage in conduct proscribed by 303(a)(4) of the Labor Management Relations Act of 1947. Any dispute which existed was created by the employer, appellee Montag, and was with Montag. First four Specifications of Error in Montag and first five Specifications of Error in Holman and Curtis.

(b) Local 1849 was not an agent of the International, and the International is not liable.

(c) Appellants are entitled to damages in a sum of not less than $40,000.00 from appellee Montag.

(d) Appellees are not entitled to damages.

This argument is directed to the primary legal issue which is made by the first four Specifications of Error in Montag, and the first five Specifications of Error listed in Curtis and Holman. (Supra pp. 14-17 this brief.) Appellants urge that they were guilty of

no acts which violated Section 303(a)(4) of the Labor Management Relations Act of 1947, as amended, and that such acts as they engaged in were not actionable under Section 303(b) of the Act, 29 U.S.C.A., Sec. 187(a)(4); 29 U.S.C.A., Sec. 187(b). Appellants contend that the dispute here involved was between the appellee Montag and the appellants about the allocation of work as provided by contract between appellants and Montag, that there could not be a jurisdictional dispute between the appellants and Montag under the Act and there was no jurisdictional dispute between appellants and any other union as contemplated by the Act. Neither the Act nor any sections thereof contemplate that any right of action is accorded to an employer who is the sole and primary disputant in a work controversy. Therefore the court was in error in finding that:

> "2. Defendants' conduct violates Sec. 303(a)(4) of the Labor-Management Relations Act, 1947, and is actionable under Sec. 303(b) thereof, and said defendants are liable to plaintiffs for damages caused thereby." (Montag, No. 18875, CT 60; Holman, No. 18876, CT 28; Curtis, No. 18877, CT 29).

We respectfully direct the court's attention to the opening statement of appellee, Montag:

> "The agreed facts in the pretrial order spell out in some detail the background of dispute and the relationship of the parties. . . ." (RT p. 15, lines 18-20.)
>
> ****
>
> "It was not too long after that—I think on the 3rd of June, that the trouble first started on the

multipurpose crane and at that time the members of the Carpenters' Union took the position that they would not handle, complete or have anything to do with any wooden form that had been rigged by the Iron Workers, and Mr. Brown served notice on the company, in line with the notice he had served before, that that was carpenters' work and he wouldn't touch it.

"The men were sent home. I think they worked through that first day and then they were sent home and a few days later a call was put in to the Carpenters' Union and the carpenters were sent back on the job and they still refused to handle the wooden forms and were laid off again.

"Complaint was made to President Hutcheson of the Carpenters' Union. (RT p. 22, lines 4 to 21.)

****

"Mr. Hutcheson of the Carpenters and Mr. Lyons of the Iron Workers in the meantime had discussed this matter and Lyons advised his representative that the Iron Workers would relinquish the handling of these forms. Accordingly, when the International Representatives (both Carpenter and Iron Worker) showed up the employers were insisting that the men go back to work as they were required to do under the joint plan for settlement of jurisdictional disputes.

"The position of the International Representative of the Carpenters was that the men would not go back until the dispute was resolved and, consequently, they spent several days trying to find ways to iron out the dispute.

"Eventually on June 20 they came to an agreement which was signed by Mr. Holland of the Iron Workers and Mr. Hiller, the International Representative of the Carpenters' Union, in which they agreed that the work should be

> handled in a particular way that the men would go back to work and there would be no further work stoppage.
>
> "Then the matter carried on from that time up until the month of August and in the month of August (this refers to 1957) a wire came out from President Hutcheson of the Carpenters' International, which is also an exhibit in this case, (exhibit 43) advising the International Representative of the Carpenters' Union that the Carpenters and Iron Workers had agreed on a division of work under which the making and handling of all wooden forms was to be the work of the Carpenters, including the use of power equipment, and instructions were issued to the International Representatives to place the policy in effect on the project. Accordingly the International Representatives and Mr. Brown of the Local Union approached the plaintiff contractor on the job and showed him the telegram they received from Hutcheson and announced that that policy was going to be enforced on the Ice Harbor project and the contractor demurred and I think September 5th the men showed up and each of the Carpenter Representatives had a copy of the telegram and they announced on the job that they were going to enforce the directions. Consequently they refused to handle any forms handled by the Iron Workers and it was shut down again . . ." (RT p. 23, line 15 to page 25, line 9.)

Generally this is a correct narrative statement and supports the contention of appellants (see statement of Guess, infra p. 25) that appellee Montag determined before the commencement of the construction that it would assign work to the Iron Workers and that despite any demand of the Carpenters, job history in the area, questions of contract, agreements between Carpenters and Iron Workers eliminating

any jurisdictional controversy, or decisions of the National Joint Board for Settlement of Jurisdictional Disputes which were not acceptable, it would make the assignment that best suited only its own economic situation. We doubt that appellee Montag will depart from its claim to exclusive and sole assignment of work, for it contended in its briefs in the District Court and in its argument, that because the Board could not compel the change of a work assignment once made by an employer, appellants here were subject to suit and to damages even if the dispute was between appellants and appellee Montag. Arguments and references to the record which follow, conclusively illustrate the fact that the dispute was not jurisdictional as contemplated by the statute.

Prior to July 1, 1957, John T. Dunlop was the Chairman of the National Joint Board for the Settlement of Jurisdictional Disputes to which we will refer hereafter as the National Joint Board. He was succeeded by Richard James Mitchell as Chairman on July 1, 1957. During Mr. Dunlop's tenure as Chairman no notification had been made to the National Joint Board of any strike at the Ice Harbor project over a work assignment. (Exhibit 9, deposition of Mitchell, pages 4, 11.) According to Mr. Mitchell he had attended a meeting of the Carpenters and Iron Workers International Unions early in July 1957 in Washington, D.C., where it was agreed between the two crafts that the Iron Workers would concede to the Carpenters the right to handle and hoist wooden forms on dam sites and heavy construction projects. The two Internationals reached agreement in the

meeting, to the effect that the handling and hoisting of wooden forms on dams and heavy construction projects was properly the work of the Carpenters. This agreement was published covering the issue in dispute for the Pacific Northwest. (Exhibit 9, p. 15, 21, 22, 23, 31, 35, 36.)

In August 1957, and well before the cessation of work on the Ice Harbor Dam project on September 10, 1957, appellee Montag was well aware of the fact that the Carpenters and Iron Workers were not in conflict, but had reached agreement on the matter of the allocation of work at the project. This is borne out by the testimony of the appellee Montag representatives, and particularly by Mr. Sam Guess who was at the time the Executive Secretary of the Associated General Contractors of America in the Spokane area, and who was acting in a representative capacity for appellee Montag. Mr. Guess testified as follows:

> "Q. In substance, what did Mr. Brown of Carpenters Local 1849 tell you?
>
> "A. He told me an International agreement had been reached between the two Internationals about the rigging and that they were going to insist that the thing be put into effect, and I called Mr. Hankins at that time and he explained over the telephone to me the agreement in sum and substance.
>
> "Q. This was on August 23?
>
> "A. Yes, sir.
>
> "Q. What did Mr. Hankins tell you about the agreement?

"A. He told me that the Iron Workers would handle the steel forms and that the Carpenters would handle the wooden forms—the rigging of them; on the iron forms, or the steel forms, that the Iron Workers would hook onto them and raise them into position and that the Carpenters would take them from the sling and then on to return to ground that the Carpenters would unbutton and hook on and the steel form would go to the ground and be unhooked by the Iron Workers; he also gave me the procedure for the wooden forms. (RT p. 148, 149.)

Mr. Guess also testified that the telegram from Hutcheson of the Carpenters was made known to him in the latter part of August and that it was discussed, but that the contractor would not accede to it.

"A. *I told him that the contractor had not acceded to their demands and that he had bid the job based on rigging the job by the use of Iron Workers,* and we went into the entire history of the thing and that we didn't believe it was proper to put two crews on there, and that it was an inefficient way to run the job, and we believed that they should take the thing to the Joint Jurisdictional Board, and that the thing could be amicably settled without no strike." (RT 150, 151.) (Emphasis supplied.)

Mr. Guess further testified as follows:

"A. Well, the policy had been laid down that the Iron Workers would do the steel forms and there was an agreement between the two International Presidents that the steel forms would be the work of the Iron Workers and the wooden forms the work of the Carpenters and no deviation from that could be granted." (RT p. 156.)

There is no dispute between any of the parties that an agreement actually had been reached between the

Carpenters and the Iron Workers; for that fact is verified not only by the testimony of Mr. Guess, but by that of Mr. Mitchell. (Exhibit 9, p. 13, 14.)

George Holland, general organizer for the Iron Workers International, testified that he was well aware of the agreement reached between the two Internationals and that when the agreement was submitted to the appellee Montag it refused to comply with it, stating that it had protested to the Joint Board. Mr. Holland further testified that from that time on the negotiations did not involve disputes between the two International Unions, but consisted of the attempts of the two International Unions to agree on some form of the division of work that *would be acceptable to appellee Montag.* Thus, what has been continually labelled as the "dispute" between the Iron Workers and Carpenters, was in fact the unremitting *attempt of the unions to tailor an agreement that would be acceptable to the employer.* (See exhibit 7, deposition of Holland, pp. 33, 34, 38, 39, 40, 41, 44, 45.)

Mr. Sam Pickel, the business representative of Iron Workers Local No. 14, testified that he received a telegram from the President of the Iron Workers that an understanding had been reached between the Carpenters and the Iron Workers, and he was advised, as was Holland and the Carpenters, to put the agreement into effect on the projects in question, including the Ice Harbor Dam project.

Mr. H. O. Montag, the top official of appellee Montag, was also well aware of the agreement made be-

tween the Iron Workers and the Carpenters. (RT pp. 695, 696.)

The evidence wholly preponderates to the effect that in August the appellee Montag knew about the agreement between the Carpenters and the Iron Workers. There is strong evidence that appellee could have been aware of the agreement made in Washington on July 11, long before it created the controversy itself on September 10, 1957. The record and the opening statement of counsel for Montag, heretofore quoted, indicates that even in June of 1957 the unions had made an agreement about the work and that the Iron Workers had relinquished their claims. (There is no evidence that either before or following a pre-job conference the Iron Workers had ever asserted a positive demand.)

Holland, the representative of the Iron Workers, testified that in a meeting on June 17 at the site of the Ice Harbor project, at which time he and Hiller, the International Representative of the Carpenters, and others discussed the work assignment with Mr. Darrell Mason, the project superintendent of appellee Montag, he told Mr. Mason that the Iron Workers would *immediately make concession to the Carpenters* of the handling of wood forms in any manner. He testified that Mason was "definitely not satisfied with this arrangement. . . ." Thereafter, Holland testified he left the dam site and went to Ephrata, Washington, where on the following morning he was advised to return to the dam site and settle the matter of the work assignment. Holland returned to the dam site and told Mr. Mason again that the Iron Workers were

not contesting, but were relinquishing the rigging on the wood forms. The contractor stated however that he would not return the Carpenters to work under the conditions that were discussed. Consequently, on Thursday, June 20, Mr. Hiller of the Carpenters and Mr. Mason of appellee Montag, along with Mr. Montag and Mr. Sam Guess and Mr. Holland agreed that the Carpenters would return to work and the Iron Workers would continue servicing the multipurpose cranes of the project. Some other arrangement was also entered into so far as the Carpenters' work was concerned and a stipulation was signed that there would be no further work stoppage. (See deposition of Holland, exhibit 7, p. 29, 30, 31, 32.)

Ultimately all parties, appellee Montag and appellants submitted the controversy, in accord with their contract, to the National Joint Board in Washington, D.C. On the National Joint Board eight of the members represent the unions and seven represent management. When meeting on a jurisdictional dispute all members sit as members of the Board, but only the regular members vote on a job decision. Four representatives of the unions and four representatives of management constitute the active voting regular members of the Joint Board. (Exhibit 9, deposition of Mitchell, Chairman of Joint Board, pp. 17, 18.) The Joint Board had its three hundred ninety-sixth meeting on November 26, 1957, at which time the submitted dispute between Montag appellee and appellants was taken up. After its proceedings in the controversy (exhibit 9, pp. 27-34 incl.) the Board issued its decision as follows:

> "Hooking-on, handling and signalling of all wood forms shall be assigned to Carpenters. In other respects, there is no basis to change the contractor's assignment. However, when not working on, hooking on, handling and signalling operations, the trades shall proceed with other work as assigned by contractor."

Montag, the appellee, refused to put into effect the directive of the National Joint Board. This refusal is made crystal-clear by the examination of Mr. Mitchell by Mr. Rogers, counsel for appellee Montag. (See exhibit 9, pp. 36, et seq.) Colloquy referred to in the exhibit, i.e. the deposition of Mr. Mitchell, the Chairman of the National Joint Board, shows conclusively that Montag never intended to abide any decision that did not meet its practice—established not at any consultations with the Carpenters and Iron Workers Unions—but at the time of its bid when it had determined to use Iron Workers. (See testimony of Guess, supra, p. 25 of this brief.) As Mr. Mitchell testified, the Joint Board in its decision recognized the fear of the contractor that he might he required to use duplicate crews, and the Board was of the opinion that their directive was a very proper solution to the contractor's problem. On January 9, 1958, the Joint Board again directed the contractor to accede to its directive. (Exhibit 9, p. 46.) And again in March the Joint Board directed the contractor to proceed with the assignment which it had directed in its job decision of November 26. (Exhibit 9, p. 47.) It should also be noted that on February 26, 1958 the Board had given permission to Mr. Guess, representing appellee Montag, and Mr. Rogers to discuss the matter again

with the Board. (Exhibit 9, p. 59.) Plainly because the contractor disagreed with the Board, it had no intention of following the directive. (Exhibit 9, p. 55.) This was so even though two employer representatives on the Joint Board had visited the site of the work and were of the opinion that the directive of the Board of November 26 was proper and feasible. (Exhibit 7, pp. 55, 56, 57.) It thus appears that even after submission to the Board, and after appeal, the contractor Montag, appellee, had no intention of abiding the Board's directive and made no attempt to put it into effect. (Exhibit 9, pp. 59-64 incl.) This was so even though appellee Montag had agreed to be bound by the decision of the National Joint Board. (Exhibit 9, p. 60.)

In summary, we have the following posture of facts:

1. Appellee Montag, prior to its commencement of construction on the Ice Harbor Dam project determined that it would make the work assignment to the Iron Workers. It framed its bid for the job by determining that factor for its calculations.

2. It paid no attention to the Carpenters' submission of letters from fifty-six contractors in the jurisdiction definitely establishing that the area practice was to assign the work involved to the Carpenters. (RT p. 29, Exhibit 3, p. 4, Sec. (b).)

3. Montag refused to make any change in its assignment, even though the Iron Workers relinquished

any claim to the work in question on or before June 17, 1957.

4. Although the Iron Workers and Carpenters, appellants, came to agreement on the matter of the work involved, in Washington, D.C., on July 11, 1957, and even though it is admitted by all parties that such agreement was known to Montag, appellee refused to accede in anywise to that agreement.

5. After submission of the dispute in accord with agreement to the National Joint Board, appellee Montag refused to abide the decision of the National Joint Board of November 26, even though it was directed to do so on several occasions following the rendition of that decision. Montag appellee never did accede to the Board directive.

The testimony in the record conclusively supports the argument that what Montag refers to as the "dispute between the Iron Workers and appellants" was in fact not a dispute between those two unions; the difficulty or dispute arose and was kept alive by Montag's refusal to accept any agreement between the Iron Workers and appellants, and it was compounded by the efforts of the Iron Workers and appellants to satisfy Montag. The unions had no dispute with each other.

Because the facts conclusively establish the absence of a "jurisdictional dispute" as contemplated by the Congress in its enactment of the Act, the appellants urge reversal of the District Court.

We believe that *Penello v. Sheet Metal Workers Local Union No. 59,* 195 F. Supp. 458, is uniquely appropriate to the position of the appellants. Not only that opinion, but subsequent reasoning of the National Labor Relations Board supports the position of the appellants in the plea for reversal of the District Court and the judgments entered pursuant to its decision and findings. We agree with the National Labor Relations Board in *Highway Truck Drivers and Helpers Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Safeway Stores, Inc.,* 134 NLRB No. 130, 1961, CCH, NLRB, p. 10,719, referring to Penello, supra, that ". . . Judge Wright (author of Penello) made a painstaking analysis of the statutory provisions here in issue in the light of the CBS decision.

. . ." (*N.L.R.B. v. Radio and Television Broadcast Engineers Union,* 364 U.S. 573, 81 S. Ct. 330, 5 L. Ed 2d 302.)

So far as we know, no litigant has upset the reasoning or conclusion of *Penello* in any appellate court. And it is a matter of record that since the decision, the National Labor Relations Board has adopted its substance and reasoning.

In *Penello,* supra, the alleged dispute grew out of a situation which was created when the DuPont Company in Deleware undertook to expand its facilities. The key factor in the determination of DuPont was wholly economic in nature. DuPont, in order to perform certain sheet metal work, hired workers who were classified as iron workers and millwrights,

through a hiring hall. The workers lived near the plant of DuPont.

The Sheet Metal Workers Union Local 59 represented sheet metal workers in the Wilmington, Delaware area, and it viewed the expansion work of DuPont as involving essential employment of the sheet metal trade. DuPont, however, would not enter into a contract with the Local when it was approached, because the only way in which the members could be given work would be under sub-contract by DuPont with the contractor with whom the Local had an agreement or contract. It was here that essentially economic obstacles appeared.

Local 59 had contracts in the Wilmington area that required that work be compensated by the usual wage paid to sheet metal workers, plus an additional $10.00 a day travel pay, to which DuPont objected strenuously. No agreement could be reached on this issue and as a result Local 59 began picketing the operation of the DuPont Company. Picketing spread to other DuPont operations, and finally employees of some subcontractors refused to cross striking workers' picket lines. *There was no threat by any of the unions who were performing work for DuPont to strike if the work was given to the Sheet Metal Workers, nor did any situation arise which involved simultaneous threats of coercion by any other workers employed by DuPont.* As a result, charges were filed with the National Labor Relations Board by DuPont alleging that Local 59 violated the ban of Section 8(b)(4)(d) of the Labor Management Relations Act. The Board petitioned

the Court for an injunction against the action of the Local, pursuant to its long-established policy.

The Court in its discussion of the matter, went into great detail in the consideration of the legislative history of Section 8(b)(4)(d), and concluded that:

> "Nor is the legislative history of the Act of aid to petitioner, for it definitively shows that Congress intended Section 8(b)(4)(d) to reach economic coercion *only* when used to resolve disputes between competing groups of employees. . . ." (195 F. Supp. p. 469.) (Emphasis supplied.)

Consequently, the court held, there could be no place for a 10(k) hearing. If only the naked language of Section 8(b)(4)(d) be considered, then there would be little doubt that the conduct of the union violated that section of the Act, but because the section does not stand alone, and must be analyzed in conjunction with the 10(k) section, no cognizable dispute existed.

The Court held further, that because of the Congressional preoccupation with jurisdictional disputes at the time the sections involved were passed, a reading of the 10(k) section would indicate that the only dispute to be determined would be a dispute *between active, rival groups of employees,* for that which was claimed to be the particular work of each. An employer has no complaint under Section 8(b)(4)(d) unless, as the Court said, ". . . he is caught between competing forces and is 'between the devil and the deep blue' . . ." (Citing *Radio and Television Engineers,* 364 U.S. p. 575.)

Judge Wright in *Penello,* clearly points out not only the error of the petitioner in that case, but the error

of the ground upon which the court predicated liability here.

> "84. For practical purposes, petitioner has relied entirely on pre-Radio and Television Engineers NLRB rules, see e.g. note 51, supra, and accompanying text, to support his theory. He has pursued this course even when prior Board law is wholly irreconcilable with that Supreme Court decision. See e.g. note 57, supra, and accompanying text." (Footnote *Penello,* 195 F. Supp. p. 473.)

Although the District Court in the instant cases properly analyzed the evil of a jurisdictional dispute when it said: ". . . The inherent evil of a jurisdictional dispute is that the work stops, not because of any dispute over wages, hours or working conditions, but because of a dispute between two unions over which is to perform the work. . . . ," (Montag 18875, CT p. 44, 45) it fell into Montag's error in asserting that no agreement made between the unions could prevent action or recovery in a 303 action. *Penello,* supra, directly answers this contention:

> "Petitioner would have the court ignore this policy of Section 10(k) however, for his theory apparently is that no agreement between the groups of employees involved can stay the operation of Section 8(b)(4)(d) so long as the employer does not agree." (*Penello,* 195 F. Supp. 466.)

And in Footnote No. 52 at the same page, the court observes:

> "It is difficult to escape this conclusion since if all groups of employees agree on a settlement, the only dispute left to be determined is that between the picketing union and the employer."

This reasoning conforms to present day rulings of the National Labor Relations Board for it held again several months ago, as it has consistently held since *Penello,* that it had no jurisdiction to settle a dispute over work assignments between an employer and his employees. (See Local 1905, *Carpet, Linoleum and Soft Tile Layers, and Butcher & Sweeney Construction Company, Inc., Local 1905,* et al, 143 NLRB No. 39.)

A further and most appropriate excerpt from the Court's opinion in *Penello* follows:

> "The NLRB has, since the passage of the Act, construed Sec. 8(b)(4)(d) to mean 'that an employer is free to make work assignments without being subject to strike pressure by a labor organization seeking the work for its members. ***' Local 472, International Laborers' Union, 123 N.L.R.B. 1776, 1781 (1959). This literal application of Sec. 8(b)(4)(d) necessarily resulted in a substantive interpretation of Sec. 10(k) not in accord with its apparent meaning. Because the Board read Sec. 8(b)(4)(d) to be a broad grant of prerogatives to employers, the Sec. 10(k) hearing was treated simply as a procedure designed to uphold these rights. The Board would determine merely whether the picketing union was entitled to the work under a Board order, certification, or a collective agreement with the employer. If not, the Board, declining to make an affirmative award of the work between the employees involved or to consider other criteria such as the employer's prior practices, custom in the industry, and the like would simply hold the picketing union was not entitled to the work. After this perfunctory 'determination' under Sec. 10(k), the employer was free to change his mind and reassign the work, at all times protected from union retaliation by the broad language of Sec. 8(b)

> (4)(d). Needless to say, assertion of competing claims by rival groups of employees was unnecessary for an unfair labor practice determination under Sec. 8(b)(4)(d) or the performance of what the Board regarded as its function under Sec. 10(k), since the emphasis upon the employer's prerogatives over work assignments rendered such a factor irrelevant."

We do not believe that *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.,* 1952, 342 U.S. 237, 72 S. Ct. 235, is controlling here any more than did the District Judge in *Penello.* It is plain that *Juneau Spruce, supra,* did not hold that one Congressional definition of "jurisdictional dispute" applied to 303(a)(4) in a civil case, while a totally different meaning applied to a case instituted by the Board. "Substantive symmetry" does not mean that the unfair labor practice claimed under 8(b)(4)(d) is generically, or in any other way, different when claimed to be such by a private litigant, rather than by the Board.

> "Petitioner cites International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp., 1952, 342 U.S. 237, 72 S. Ct. 235, 240, 96 L. Ed. 275, as controlling here. That case arose under Sec. 303(a)(4) of the Act, a provision employing the language of Sec. 8(b)(4)(d). The Supreme Court said there, 'The fact that the union of mill employees temporarily acceded to the claim of the outside group did not withdraw the dispute from the category of jurisdictional disputes condemned by Sec. 303(a)(4).' This language is inconclusive at best, for it merely says the mill employees did not dispute the longshoremen's claim 'temporarily.' Moreover, Juneau Spruce, decided prior to Radio and Television Engineers, arose under Sec. 303(a)(4) and apparently was based on the

theory that the employer's assignment was decisive. It was, therefore, an important precedent argued before the Supreme Court in the Radio and Television Engineers case. The Court, however, did not consider it controlling and disposed of it simply by saying a 'substantive symmetry' between the two approaches to jurisdictional disputes is not required. It further stated the effect of a Sec. 10(k) determination upon an action under Sec. 303(a)(4) was an open question not presented in the case. In view of some of the language in Juneau Spruce indicating a Sec. 10 (k) determination would have no effect on Sec. 303 actions, the vitality of that latter decision may now be open to question." (195 F. Supp. 468.)

In a discussion and analysis relating to Sections 8(b)(4)(d) and 10(k) of the Labor Management Relations Act, published in 12 *Labor Law Journal*, p. 1163, under the title "Jurisdictional Disputes in the National Labor Relations Board," we find the following:

"Finally, the Court rejected the Board's contention that the lower court's interpretation of Section 10(k) would be inconsistent and in conflict with Section 303(a)(4). The Board asserted that Section 303 actions do not permit a union to defend against actions for damages on the basis that the union is entitled to the work per practice, and/or custom, and that accordingly, 'substantive symmetery' between Sections 8 (b)(4)(d), 10(k) and 303(a)(4) must be preserved. The Court deftly opined: 'This Court has recognized the separate and distinct nature of these two approaches to the problem of handling jurisdictional strikes. *International Longshoremen's Union v. Juneau Spruce Corp.*; 342 U.S. 237. Since we do not require a 'substantive symmetery' between the two, we need not and do not decide what effect a decision of the Board under Section

> 10(k) might have on actions under Section 303 (a)(4).'
>
> "Thus, the Court did not decide and left unanswered what effect, if any, a 10(k) decision might have on a 303(a)(4) action for damages." (p. 1187).

In concluding, the author states:

> "The court has now plainly and irrevocably stated that Sections 8(b)(4)(d) and 10(k) are integral and interdependent elements of a Congressional intent to foster the settlement of jurisdictional disputes and that the Board's authority extends to this accomplishment. Further it appears that if conduct is within the prohibition of 8(b)(4)(d) it must present a 'dispute' within the meaning of a Section 10(k) hearing; conversely, if there is no 'dispute' which can be determined by the Board under Section 10(k) there can be no Section 8(b)(4)(d) prohibition. Finally, the language of the court in *Juneau Spruce* indicating the independent effect of a Section 10(k) determination on a Section 303 action for damages now seems of reduced significance."

The National Labor Relations Board had occasion to consider *Penello,* supra, shortly after it was decided. *(Highway Truck Drivers and Helpers Local Local* 107, *International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, and Safeway Stores, Inc.,* 134 NLRB, No. 130, 1961, CCH, NLRB p. 10,719). Approximately a year prior to this decision the Board had issued a decision and determination of the dispute in the same proceeding. It had found at that time that the respondent was engaged in picketing Safeway with the object of forcing or requiring Safeway to reassign certain truck

driving work from Safeway employees who were members of Local 639 and 660 to other Safeway employees who were members of Local 107. The Board had held that the dispute was cognizable under Section 10(k) of the Act, and had pursuant thereto made a determination.

Upon Safeway's petition to reopen the proceedings following the decision of the Supreme Court in the *Radio and Television* case, supra, the Board reversed itself, and in its opinion recited:

> "As we read it, the Supreme Court of the United States in the CBS case not only rejected the type of determination made in that case and in the instant case, but rejected also the Board's underlying view of the scope and interplay of Sections 8(b)(4)(d) and 10(k). Thus, although the facts in the instant case, as heretofore found might be deemed to fall within the literal terms of the Section 8(b)(4)(d) proscription, the Supreme Court noted in CBS that Section 8(b)(4)(d) does not stand alone but is supplemented by Section 10(k). The two provisions must be read together. So read, the provisions apply as the Supreme Court noted to disputes between 'two or more employee groups claiming the right to perform certain work tasks . . .' 364 U.S. at 586.
>
> *"The thrust of the CBS decision was, to be sure, directed at the Board's misconception of the kind of determination required by Section* 10*(k). But, in terms, the Supreme Court said it was 'the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision'* 364 *U.S. at* 585. *Implicit in this directive is the proposition that Sections* 8*(b)(*4*)(d) and* 10*(k) were designed to resolve*

competing claims between rival groups of employees, and not to arbitrate dispute between a union and an employer when no such competing claims are involved. Certainly it was not intended that every time an employer elected to reallocate work among his employees or supplant one group of employees with another, a 'jurisdictional dispute' exists within the meaning of the cited statutory provisions. (Emphasis supplied.)

"The interpretation which we put upon the CBS decision is cogently reinforced in *Penello v. Local* 59, *Sheet Metal Workers* (B.C. Del.; June 21, 1961) in which Judge Wright made a painstaking analysis of the statutory provisions here in issue in the light of the CBS decision. Judge Wright, too, concluded that the application of Sections 8(b)(4)(d) and 10(k) was confined to disputes 'between rival groups of employees' and not to disputes between an employer and a union as such."

See also:

Brotherhood of Teamsters and Auto Truck Drivers Local 70, *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Inc. and Hill's Transportation Company,* 136 NLRB No. 93, 1962, CCH, NLRB 11,117;

International Brotherhood of Electrical Workers, Local 292 *(Franklin Broadcasting Company)* 126 NLRB 1212;

Sheet Metal Workers Local 272 *(Valley Sheet Metal Company)* 136 NLRB 1402, 1962, CCH, NLRB 11,143;

Local 373 *United Association and Carlton Bros. Co.,* 137 NLRB No. 80, 1962, CCH, NLRB 11,322;

Local 1905 *Carpet, Linoleum and Soft Tile Layers and Butcher & Sweeney,* et al, 143 NLRB 39, 1963, CCH, NLRB 12,437.

If there is no "dispute" as contemplated under the jurisdictional or forced assignment clause of the Labor Management Relations Act, then there can be no Section 8(b)(4)(d) prohibition which gives rise or justification to a Section 303 action for damages. Certainly any claimed significance of the court's language in Juneau Spruce, supra, has been demolished in the *Radio and Television* case, supra, along with *Penello,* supra, and the Board's opinions and reasoning subsequent thereto.

We do not believe, that it is incumbent upon us, nor is it now incumbent upon the Court, to decide what effect the decision of the National Labor Relations Board under a Section 10(k) hearing would have been, had it been held in *Penello,* supra, in its relation to a subsequent action brought under Section 303(a)(4). The significance, however, of the nonexistence of a dispute in this case under the reasoning and definition applied to 8(b)(4)(d) is paramount, for here it has been shown that if there was a continuing dispute of any kind, then from its beginning right on through to the refusal of Montag, appellee, to accept the award of the National Joint Board for Jurisdictional Disputes, it was initiated and continued as an employer-union economic controversy by Montag. It was therefore not a dispute redressible by a private employer litigant in a 303 action. (See Dissent in *Sheet Metal Workers International and Valley Sheet Metal Co.,* supra.)

AGENCY OF LOCAL 1849 FOR THE INTERNATIONAL

Although the District Court in its opinion, following the hearing and argument on whether or not Local 1849 acted as an agent of the International, discussed primarily the case of *International Brotherhood of Teamsters v. United States,* 275 F. 2d 610 (4 cir., 1960, certiorari denied 362 U.S. 975, 1960), it held that it would prefer to base its findings on the theory that the International encouraged, induced, or participated with, the Local 1849 in the commission of the tort which was charged. (See No. 18875, opinion of the Court, Montag, CT pp. 47, 48, 49.)

We think that this Court in *National Labor Relations Board v. Mountain Pacific Chapter,* 270 F. 2d 425, disapproved of any ipso facto conclusion which is based upon the existence of written provisions in a document, whether it is a constitution or a contract.

The pretrial deposition of H. H. Brown, business agent for Local 1849, showed that he had been business agent for the Local since June 1951, and that his salary was entirely paid by the Local and that he held an elective Local office. (See exhibit 4, deposition of Brown, pages 2, 3.) Brown testified that the only thing by way of instruction that he had ever received from the International was word that a representative would be assigned. He stated that "is usually the letter I would get back from the International, would be just a short wire that Representative Hank Hiller or Sleeman, whoever the Representative happened to

be, would be assigned in," and "that is typical at least of what we got from them." (Deposition, exhibit 4, pp. 15, 16.) Brown testified that what he was trying to do was put into effect the area practice. He said that the disputed rigging was claimed by the Carpenters as the tool of the Carpenters' trade, and that generally Carpenters claimed and were given their own rigging as the tool of the trade and did not take the position that rigging as such was the work of Carpenters. (See exhibit 4, deposition of Brown, p. 17.) It is apparent that Brown had little, if any, correspondence or contact with the International Union (exhibit 4, p. 20).

It also appears that Hiller, Sleeman, Hankins, International Representatives, so-called, were merely "trouble-shooters" for the International. They are not organizers and they do not affirmatively carry on any Carpenter organizational work at all. When Hiller first had any contact with the dispute or work stoppage in June, he was informed by Brown of Local 1849 that the Carpenters had been discharged; that no carpenters were on the payroll of the company. Hiller testified that he was therefore at a loss as to how he could settle any dispute. It appears too that Hiller, in his trouble-shooting capacity, was able to settle the dispute (see exhibit 5, deposition of Hiller, p. 27; exhibit 38). Hiller testified that the position of the International was that all disputes should be processed through normal channels, because it was part of the agreement, and it was part of the jurisdictional procedure of the International.

Mr. Sam Pickel, the local Iron Workers representative, held meetings with Mr. Brown, but he had no written instructions from his International Union (Deposition of Pickel, exhibit 8, pp. 9, 10). He testified that Hiller of the Carpenters, and George Holland of the Iron Workers, came to Ice Harbor Dam because of the work stoppage, but thought they had arranged for the prevention of any further disputes, and it appears from his testimony that independent Local action precipitated disputes. As he says, Brown of the Carpenters, stated to him: "Well, it looks as though we can't agree so we might as well get our people in here and resolve this thing" (Deposition of Pickel, exhibit 8, pp. 20, 21; pp. 13, 14). It even appears that the Internationals went to the extent of locking the business agent out of the room. The business agent referred to could only be Brown of the Carpenters, and Pickel's deposition further shows that "Hiller stated at this time that the business agent of the Carpenters, H. H. Brown, would not return the men to work until settlement had been made" (Deposition of Pickel, exhibit 8, pp. 27-29).

We suggest there is no further testimony which throws any light on the question of agency other than the participation as indicated, of the International representatives in the attempt to settle the controversy. The fact that the International met on the International level certainly does not indicate a participation and acquiesence in a tort, if a tort was committed by Local 1849.

In *Local* 1016 *United Brotherhood of Carpenters*

and Joiners of America, AFL-CIO, and Booher Lumber Co., 117 NRLB 120, the Board held that as a result of the International's ratification, it became liable for the unlawful conduct found. In that case, as in this, the International came into the picture when the general office was called upon for assistance, and assigned one of its representatives to assist in settling the dispute. In *National Labor Relations Board v. Local* 1016, *United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al,* 273 F. 2d 686, the Second Circuit properly found no liability with respect to the acts of the International, and denied enforcement of the Board order.

> "The Board found that the Brotherhood representative, Lawyer, did nothing effective to break the stalemate on the installation of the non-union staircase and attributes this to what might be termed effective inaction amounting to a ratification of the Brotherhood of the unlawful conduct of the union in Hawkins. These are conclusions that are scarcely warranted by the facts and the law. Lawyer did participate in the May 23 conference, but there is no sufficient proof that he participated in, directed, or ratified the violation of Sec. 8(b)(4)(a). Accordingly, the Board's petition for an order of enforcement against the Brotherhood must be denied."

If the International is to be held liable it must be on the principles of the law of agency, and the rule is universal that the burden of proof is on the party asserting an agency relationship, both as to the existence of the relationship and the nature and extent of the agent's authority. *International Longshoremen's and Warehousemen's Union v. Hawaiian Pineapple Co. et al,* 226 F. 2d 875, CA 9.

and see:

> *United Mine Workers v. Patton, et al,* 211 F. 2d 742, CA 4;
>
> *United Construction Workers, et al, v. Hayslip Baking Co.,* 233 F. 2d 872, CA 4;
>
> *Sunset Line &Twine Co. and International Longshoremen, et al,* 79 NLRB 207.

The language in *Webb v. National Labor Relations Board,* 196 F. 2d 841, at p. 846, is appropriate:

> "It can readily be seen that the Board's conclusion that on November 15 agreement was entered into is based on inferences and suspicions drawn from remote circumstances, and it is in conflict with the direct testimony on the point. As a further example, the trial examiner states in his opinion that, 'Brown (Carpenters' foreman) also testified that although Webb and the union had not set down and entered into any agreement for the hiring of only union men, it was "just understood that they would be." That the trial examiner should call attention to such an insignificant statement is surprising, but it is more surprising that he evidently gave it some weight. The statement is not only hearsay, but is apparently hearsay founded on rumor'."

And at page 847:

> "Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established."

The testimony of the union representative to which reference has been made could not be said to establish agency. The testimony of employer representatives went solely to what they call the implication of the words or acts of the union representatives. Certainly the effort of the International Union to try to settle

the dispute after Local Union 1849 elected on its course of action does not create the agency relationship. The International was never consulted, nor did it have knowledge concerning strike difficulty until it was directly or indirectly notified that Local 1849 was in dispute with the contractor. The facts here are clearly distinguishable from the facts submitted, and in part relied upon by the District Court, to-wit, *International Brotherhood of Teamsters, etc. v. United States,* 275 F. 2d 610. In that case the agent Rutledge was in an entirely different position that business agent Brown of Local 1849. Brown was without any of authority, direct or implied, that was attributed to Rutledge.

Appellants urge that this Court require some substantial proof of implementation by the appellants here of any provision of the International Constitution, that it is claimed establishes a relationship of agency between the International and Local 1849.

APPELLANTS WERE ENTITLED TO JUDGMENT AGAINST MONTAG

The Court, after allowing damages to appellee Montag found that appellants were entitled to mitigation of those damages, and therefore reduced the damages against appellants by $40,000.00, which the Court found to be a reasonable amount in mitigation of damages because of Montag's refusal to accept the award of the National Joint Board. (Montag, No. 18875, CT p. 82, 83; exhibit 75, RT pp. 852-872, incl., RT pp. 1151-1154, incl., RT pp. 1198-1201, incl.)

While we believe that the Court was correct in law and in fact in granting appellants some relief by way of mitigation in offsetting Montag's damages by $40,000.00, we urge that Montag was not entitled to any damages to begin with, and that appellants should have been given an award by way of a judgment for damages, rather than by way of mitigation of damages allowed Montag.

Appellants contend that the decision of the National Joint Board awarding certain work to the appellants, which decision was disregarded by Montag, was a valid and binding determination of the dispute. It is the further contention of appellants that the decision of the National Joint Board required appellee Montag to assign the work directed by the Board to the members of Local 1849, and that Montag's failure to do so entitled appellants to recover damages based upon the collective bargaining contract described in paragraph 9 of the pretrial order; the damages to be measured by the wages which otherwise would have been earned by members of Local 1849, if the work had been assigned as directed. (Montag, No. 18875, CT p. 33, and p. 39, exhibit 1.)

The Court expressed doubt about its right to enforce the rights of individual union members which it thought to be "uniquely personal," and therefore granted relief to the appellants for the disregard by Montag of the award of the National Joint Board, by a mitigating award of $40,000.00. The accountants' report (exhibit 75) relating to the appellants' claim and cross-complaint indicates that the basis of the re-

port was solid and that the claim was not conjectural or speculative. As the above-quoted references indicate, the Court was also of that opinion. (See reference to record, supra, p. 48.) Appellants proved the fact of damage in excess of nominal amounts, and therefore the Court could, and should have, under the authority of the cases applicable thereto, entered judgment for appellants.

Prior to argument on damages which was held in Seattle on December 18 and 19, 1962, (RT 1135) appellants contended that the award of the National Joint Board was as enforcible as an arbitration award, and that appellants were entitled to judgment. The cases relied on included *Textile Workers Union of America v. Cone Mills Corp,* 268 F. 2d 920, CA 4, Cert. den. 361 U. S. 886; *A. L. Kornman Co. v. Amalgamated Clothing Workers,* 264 F. 2d 733, CA 6, Cert. den. 361 U. S. 819; *United Steel Workers of America v. Enterprise Wheel and Car Corp.,* 363 U. S. 593.

Montag appellee, and the other appellees, contended that the award could not be enforced by reason of *Employees v. Westinghouse Corp.,* 348 U. S. 437.

During argument appellants proposed that *Smith v. Evening News Assn.,* 371 U. S. 195, which had just been decided, determined the issue in the appellants' favor. The contention is urged now by appellants. In *Smith v. Evening News,* supra, the Supreme Court spoke as follows:

> "However, subsequent decisions here have removed the underpinnings of Westinghouse and its holding is no longer authoritative as precedent . ."

And

> "*Textile Workers v. Lincoln Mills,* 353 U. S. 448, has long since settled that Sec. 301 has substantive content and that Congress has directed the courts to formulate and apply Federal law to suits for violation of collective bargaining contracts. 'There is no constitutional difficulty.'" and "'Sec. 301 is not to be given a narrow reading.'"

And

> "The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of Sec. 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforcibility of the collective bargaining contract on which they are based. To exclude these claims from the ambit of Sec. 301 would stultify the Congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do."

We urge that to deny damages to the appellants where a breach of collective bargaining agreement has been found, would in fact stultify the whole Congressional policy, and would permit at will, the deliberate violation of contracts by employers who might be tempted to rely on the sterility of the law to enforce an obligation in damages against them.

APPELLEES ARE NOT ENTITLED TO DAMAGES

(A) Montag:

Montag, having made a determination of work assignment in its bid and prior to any construction work on the Ice Harbor Dam was committed to disregard any determination of the rights of employees or unions so far as their work assignments might be concerned. Montag created the very situation that resulted in *its* dispute with the appellants. And certainly the record is replete with proof that no disagreement existed between the Iron Workers and appellants when the Iron Workers conceded any claim at all to the work involved on or about the 16th or 17th of June, 1957. Montag, as the record discloses, not only *admitted* that the unions were in agreement, but in one part of the argument during trial *contended* that the unions were in agreement. (RT p. 893, and see infra p. 53.) The record also is definite that there was no other dispute involved as to any other craft. Mr. Montag, himself, made this very plain. (RT p. 903.)

If agreement existed in July of 1957 as the result of consultations at and with the National Joint Board for the Settlement of Jurisdictional Disputes, and that agreement was known, as it was conceded to be by Montag, then it was Montag's refusal to deal with appellants that precipitated and continued a dispute. Whatever remedy Montag might have had under law, certainly it did not have an action in damages under

the Act, as and for a jurisdictional dispute between Iron Workers and appellants which placed it "between the devil and the deep blue . . ."

The claim of "no jurisdictional dispute" is concurred in by Montag. In a memo to the District Court it made its position plain and although the memo is not in the record, we are hopeful that Montag will approve the assertion made therein:

> "It appears from the testimony that whatever dispute may have existed between the unions was settled on July 17, 1957, by an agreement to give the rigging of wooden forms to the Carpenters union. (Mitchell deposition, exhibit 9, pp. 15, 30-31.) The agreement was reaffirmed on November 14, 1957. (Exhibit 9, p. 31.) The action taken by the Board on November 27, 1957, was pursuant to the request of both unions on November 18, 1957, that the contractors be compelled to put their agreement into effect. (Exhibit 9, pp. 28-29.)"

And

> "The procedure referred to is set forth in exhibits 2 and 3. Examination of these exhibits, as well as the language of the contract itself reveals that the Joint Board was authorized to decide only conflicting jurisdictional claims between unions. It was not authorized to settle disputes between a union or unions, on the one hand, and the employer, on the other. Since no dispute existed between the unions on November 27, 1957, the Board had no jurisdiction to act." (Plaintiffs' brief on remaining issues, pp. 31, 32.)

The awards of damages were based in great part on the methods employed and the award made in *Morrison-Knudsen Co., Inc. v. International Brotherhood of Teamsters, Inc.,* 270 F. 2d 530, 9th circ. Appellants

urged during the trial, and urge in this appeal, that the damage award to Montag here was of such conjectural and speculative character that it should not prevail.

The Court denied any recovery to Montag of claimed interest or profit. The items allowed may be found at Montag No. 18875, CT pp. 70, 71. The claims made by Montag may be found in exhibit 68 with attachments. The largest item allowed by the court to Montag was an amount of $77,390.00 as and for reasonable rental value of equipment or idled equipment. (Montag 18875, CT p. 71.) The principal argument directed against the allowance made by the court may be found in exhibit 74, commencing at page 16. This report is the report of appellants' accountants and auditors made after an examination of records and figures submitted to such accountants by Montag. (RT 765-782.)

In addition there is other argument which we desire to urge. First, the factual situation here in respect to idled equipment is considerably different than in the ordinary case where the idling of the equipment prevents its use in an income operation. The actual situation of Montag at Ice Harbor was such that there was never a time during the dispute that it could use the equipment for which it was awarded judgment, for rental on any other project, except the Ice Harbor project. Montag would not, even if solicited, have rented the equipment, for it intentionally kept the equipment at the project for many months after completion of Montag's particular part of the whole Ice

Harbor contract. Some of that equipment was then sold and the rest of it was transferred to the John Day project—a dam in the State of Oregon.

The record establishes that there were certain other phases of work other than that in the Montag contract, to be completed at Ice Harbor Dam, particularly what was referred to as the North Shore Contract. (RT 424.) Montag bid on the North Shore Contract the work under which was to be let some time in 1959. Montag also bid on the John Day Dam, which work was to commence in December of 1959. During the period of time waiting for results of the bid, Montag kept its machinery at the Ice Harbor Dam site in expectation of getting a further contract there upon which its machinery would be used. If there was any delay occasioned by the cessations of work, those cessations were not a cause of the loss of any rental to Montag, for even had it used its equipment during the idled periods and finished the project on time, it would have retained its equipment on the dam site, pending the result of its attempts to secure contracts on Ice Harbor and at John Day, which did not commence until December 1959. (RT 423-434.)

Reference to exhibit 74 discloses that the basis of charges made by Montag was artificially expanded. Montag used estimated new replacement value, and as exhibit 74 points out, the Northwest 80D Crane used for rental computation was valued at a replacement cost of $72,000.00, although it cost Montag only $20,000.00. The further effect of this method of computation shows that the rental of some of the items

computed with an over-estimate of replacement cost, exceeded the entire actual cost of the equipment of the contractor. (See pp. 16, 17 of exhibit 74.) It appears obvious that the whole basis of the computation of Montag was theoretical rentals based on estimated replacement costs. It appearing that there is no possible basis for claiming charges inasmuch as the equipment had to be kept at the Dam, it further follows with certainty that no losses accrued for idled equipment. Montag's intent in its bidding required it to retain its equipment at Ice Harbor Dam many months after the contract completion, even if it had not been delayed.

As to all of Montag's claims, its witness Burton M. Smith testified:

> "This is an arithmetical computation which is accurate." (Exhibit 68, p. 7.)

The Court also made a substantial award of $35,-225.75 to Montag as and for what it claimed was efficiency loss. Montag attempted to prove a loss of efficiency by claiming that appellants' unlawful conduct resulted in a loss which it claimed was equivalent to the project payroll period of one week (5 days). (See exhibit 70, p. 7, RT 482-490.) The testimony, however, indicates that the claim of efficiency is wholly conjectural. Montag attempted to establish, as reference to the record indicated, that its efficiency loss was five days because it was so found by some of its officials. There was a complete lack of any showing that there was any difficulty in getting men back to work, —in

fact the same men came back who had been working before the cessation, —or that there was any let-up in the pouring of the concrete or other work. In this respect the case is wholly dissimilar from *Morrison-Knudsen* (supra) where the work stoppage involved an elapsed time of approximately two and one-half months. Neither under the theory of *Morrison-Knudsen* where plaintiff showed that its costs materially increased after its shut-down, or in accord with substantive Washington law did Montag prove any loss of efficiency. Not only that, having asked for damages on every conceivable part of its operation, it cannot duplicate its claim by an assertion of fictitious efficiency loss.

In the case of *Curtis, et al, respondents, v. Puget Sound Bridge and Dredging Company, appellant,* 133 Wn. 323, 233 P. 939, the court established standards of proof:

> "The next reason given for reversal is that no damages were proved. This contention can be briefly disposed of by the statement that there is abundant testimony, which the jury had a right to believe, that the efficiency of the respondents' workmen was greatly reduced by being compelled to work in the mud and water, that many thousand extra feet of lumber were made necessary, the material had to be handled in the slime, and that tools and jacks were lost by reason of these conditions. Under such a record it cannot be successfully claimed that no damages were proved."

The basis of the court's opinion in *Carpenters Union Local* 131 *v. Cisco Construction Co.,* 266 F. 2d 365,

9th circ., adds nothing to the strength of Montag's claim:

> "The defendants produced testimony to the effect that the whole loss was due almost entirely to bad management. But Cisco had a version which placed the fault of almost all of the delay on the defendants. Its witnesses said Cisco was hurt by difficulties and delays in getting men and by getting men unskilled for jobs they were undertaking to do. Then there was an unusually high turnover of men due, it said, to necessity to discharge many men who proved unsuitable. The only real means of getting men was by advertisements in newspapers. The trial court was unwilling, on the evidence, to trace all of the losses and delays to the defendants. But believing that there was substantial damage chargeable to the defendants and announcing that it found the damage from defendants' acts to be 'not less than $75,000.00,' judgment was therefore ordered in that amount."

We find that there is no proof submitted by Montag that in anywise conforms to any of the factual situations considered by courts in supporting an efficiency loss, and we therefore urge that absent proof, no judgment should have been entered in respect to that claim.

The court also made an award of $30,007.56 to Montag for overhead salaries. (See Montag 18875, CT p. 70.) This amount allowed was practically the entire claim made by Montag.

It was admitted, and we expect no contradiction to the proposition, that at the time of the June shutdown the entire work force was moved to another area and performed other work than on the particular phase of the work that it had been handling prior to

the cessation. Obviously, the overhead salaries and administrative expense would have to continue in any event, because at one time or another during the completion of the contract, the work performed during the cessation would have had to be completed. Also, it goes without saying that this argument applies to all of the other factors which are involved in the computation of the damage claims by Montag.

Again the basic objection to the items of claim heretofore discussed and to the balance of the items is made because all of them were theoretical computations. Montag made no attempt to show that there was any money loss on its contract and it produced no evidence of any loss to the joint venture.

The proof in this case is the same type of proof which was disapproved by the 6th circuit in *Flame Coal Co. v. United Mine Workers of America,* 303 F. 2d 39. In that case, as in this, there was testimony that the schedule had been worked out which purported to compute profits lost by companies in the concellation of orders. The court held that arithmetical computations, so-called, are not valid proof.

(B) Curtis:

The court was obviously not satisfied with the proofs in the Curtis case, and certainly the appellants were not. (RT 1176, 1177, 1183.) Exhibits 6 and 7 were offered as the testimony of appellants' witness without objection by Curtis, and the witness for appellants who composed the exhibits was submitted for cross-examination. (RT 1007, 1008.)

The witness concluded that no reasonable, accurate determination of actual costs or losses attributable to the work stoppages could be ascertained beyond doubtful conclusions. Curtis records were composed hastily and did not disclose any information as to the dates or length of the time of the work stoppages. In excess wage claims claimed by Curtis, it appeared that during the stoppages men were engaged in repair and maintenance and there was no accurate tabulation to be examined. It was impossible to find out whether any equipment, which was listed and under which claim was made by Curtis, was actually on the Ice Harbor job during the periods in question. Equipment for which rentals were claimed had been almost completely depreciated and Curtis had been carrying on other jobs at the same time which necessitated the use of his equipment. (See exhibit heretofore, and RT 999-1000.)

Appellants were required to make two reports with respect to the Curtis claim, it having been revised after the first claim of Curtis had been presented. (See exhibits 6 and 7.) Both of these exhibits having been admitted as the testimony of the appellants, it clearly appears that the amendments to claims submitted by Curtis were completely theoretical. We urge that the rule which permits assessment of damages when the fact of damage is established cannot apply to this claim, when it has been determined that the claim has been constructed wholly out of theory, and without a basis in actual values. (See *Flame Coal,* supra.) Certainly the rule permitting the finding of damages, if the fact of damage is established, does

not permit a claimant to theorize without a foundation in fact from which a reasonable proposal can be advanced.

(C) Holman:

No record reference we believe is necessary to establish agreement between appellants and appellee Holman that its contract was essentially, if not almost exclusively, a labor contract. In other words, its materials, steel, etc. were furnished, and its duty was to handle the fabrication and installation.

Initially we would direct the court's attention to exhibits 7 and 8 which are accepted as the testimony of appellants' witness. (RT 1050, 1051.) Practically no data was ever submitted to appellants as a basis for the Holman claim. And the proof for items which were claimed was not kept in Holman's records, nor was the proof in a condition that could be used to verify any of the items claimed by Holman. (RT 721, 722.) The basis of Holman's claim was nakedly hypothetical. Not only that, the only submitted data was inaccurate as appears from exhibit 8. The reconstruction, so-called, by Holman's witness was related to a contract of $1,569,000.00, while the claim itself was rested wholly on the reinforcing steel contract where the total sum was about one million. (RT 1123.) The entire basis therefore of the only estimate provided to appellants was 37½% to high on that factor alone.

The court never was able to understand the basis of the claim made by Holman. Examination of the witness Williams for Holman illustrates without argu-

ment the complete inadequacy of the basis of claim. (RT 1089-1099.)

> "A. Mr. Etter, that is a series of hypothetical questions and . . .
>
> "Q. (Interposing) Isn't your particular theory here, isn't that hypothetical? Isn't this a hypothetical theory you have here?
>
> "A. Any theory is hypothetical, Mr. Etter.
>
> "Q. Yes; have you done cost accounting.
>
> "A. Yes.
>
> "Q. Now, wouldn't it have been easy, if you were going to establish damages, to establish what your cost was for your operation immediately prior to work stoppage and then determine what the cost was immediately after the work stoppage?
>
> Wouldn't that have been the way to show any lack of efficiency by cost rather than theory?
>
> "A. I think that had any of the plaintiffs anticipated all the ends to which this results, they would have called in a fleet of accountants then and changed their entire normal procedures to—that would have been advantageous. (RT 1097-1098.)

The best expression or appraisal of proof here is found in the statement of the court:

> "THE COURT: Gentlemen, I have examined the evidence in this case, particularly the exhibits, and have read the testimony and I am—and I find that there has been some damage suffered based upon the testimony of Mr. Ronfeld and Mr. Holman.
>
> "I am utterly unable to determine from the evidence presented and the exhibits presented what the damage actually is.

> "Therefore, the burden being upon the plaintiff, I must find against the plaintiff and allow no damages.
>
> "Due to the fact that there was some damages I will not allow costs to either side.
>
> "I have made a very careful effort to try to interpret the exhibits and the theory of the plaintiff and to arrive at some amount of damage with a reasonable degree of certainty and I am unable to do so." (RT 1187-1188.)

The Court indicated before finally making an award to Holman of $10,000.00 that it still could not determine the theory of Holman's presentation. It is on this basis that we urge a reversal of the entry of judgment for Holman. (RT 1203, 1207.)

CONCLUSION

We respectfully submit this case to the court in a belief shared by persuasive authorities that no basis of action existed under the Act for which judgment was entered. The order of the District Court should be reversed and the judgment set aside, and the appellants should be awarded damages against Montag in the sum of not less than $40,000.00. In any event, the proof of damages made by appellees was such that the awards should be set aside or materially and substantially reduced.

Respectfully submitted,
R. MAX ETTER,
Attorney for appellants.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. MAX ETTER

APPENDIX I

In the District Court of the United States
for the Eastern District of Washington
Southern Division

C. J. MONTAG & SONS, INC., a Washington corporation; CARL M. HALVORSON, INC., an Oregon corporation; AUSTIN CONSTRUCTION CO., a Washington corporation; BABLER BROS., INC., an Oregon corporation; and McLAUGHLIN, INC., a Montana corporation, *Plaintiffs,* vs. INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO); CARPENTERS' LOCAL 1849, United Brotherhood of Carpenters and Joiners of America; WASHINGTON STATE COUNCIL OF CARPENTERS; and COLUMBIA RIVER VALLEY DISTRICT COUNCIL OF CARPENTERS, *Defendants.*	CIVIL ACTION No. 1274

PRETRIAL ORDER ON LIABILITY ISSUES

(1) A pretrial conference in the above-entitled action was held between the parties and counsel under the direction of the court on the 7th day of April, 1960. Plaintiffs appeared by Manley B. Strayer, James P. Rogers and Walter J. Robinson, their attorneys, and defendants appeared by R. Max Etter, their attorney.

(2) It is agreed among the parties, and it is hereby ORDERED that this pretrial order shall supplement the pleadings herein, and the pleadings shall be deemed to be amended to conform herewith.

(3) It is further agreed among the parties, and it is hereby ORDERED, that the issue as to amount of damages sustained by plaintiffs be, and the same hereby is, segregated for separate and later hearing and determination by the court in the event the court shall hold that liability exists.

(4) As hereafter more particularly set forth, the parties are in dispute as to whether plaintiffs violated a duty to defendants in failing to place in effect a decision of the National Joint Board for Settlement of Jurisdictional Disputes, dated November 27, 1957, and whether, based thereon, defendants are entitled to recover on their cross complaint damages based upon the collective bargaining contract described in Paragraph 9 and measured by the wages which might otherwise have been earned by members of Local 1849. It is agreed among the parties, and it is hereby ORDERED, that in the event the court shall hold that damages measured by such wages are recoverable in this action, then in such event the issues as to whether such violation by plaintiffs occurred and the amount of such damages by wage loss shall be, and the same hereby are, segregated for a separate and later hearing and determination by the court.

(5) It is agreed among the parties, and it is hereby ORDERED, that in the event the court should hold that defendants' Contention No. 2 (breach of contract) would, in the circumstances of this case, constitute a defense to this action, then in such event the issue as to whether such breach occurred shall be segregated for separate and later pretrial and hearing and determination by the court.

STATEMENT OF THE CASE

This is an action by plaintiffs against the defendants under Section 303(b) of the Labor-Management Relations Act, 1947, 29 U.S.C.A. Section 187(b), hereinafter called the "Act," alleging that defendants have engaged in, and have induced and encouraged plaintiffs' employees to engage in, a concerted refusal to perform services for plaintiffs, otherwise termed a strike, an object of which was to force and require plaintiffs to assign the rigging of wooden forms to members of defendant Carpenters' Local 1849 rather than to members of Iron Workers Local 14, to whom said rigging work had been assigned, in defiance of Section 303(a)(4) of the Act. Plaintiffs seek damages in the sum of $514,200, and attorneys' fees of $15,000, plus costs.

By cross complaint, defendants seek enforcement of an alleged award of the National Joint Board giving the work in question to the employees of plaintiffs who were members of the Carpenters Union and denying it to the employees of plaintiffs who were members of the Iron Workers Union.

AGREED FACTS

1. When used herein:

(a) "Carpenters International" means defendant International Brotherhood of Carpenters and Joiners of America (AFL-CIO), an international labor organization;

(b) "Local 1849" means defendant Carpenters' Local 1849, United Brotherhood of Carpenters and Join-

ers of America, a local labor organization;

(c) "Iron Workers International" means International Association of Bridge, Structural and Ornamental Iron Workers Union (AFL-CIO), an international labor organization;

(d) "Local 14" means Iron Workers Local 14, International Association of Bridge, Structural and Ornamental Iron Workers Union, a local labor organization;

(e) "Joint Board" means the National Joint Board for the Settlement of Jurisdictional Disputes, a private entity created by agreement between organizations of employers, including plaintiffs, and labor organizations in the construction industry to assist in the settlement of "jurisdictional disputes," that is, controversies over the assignment of work tasks by employees to members of one labor organization rather than to members of another labor organization.

(f) "Rigging" or "rigging forms" means the hooking and unhooking of forms of both wood and metal which are elevated into place in order to comprise the outer and inner shell of portions of the structure of a dam, into which concrete will be poured, to be removed after the concrete has been sufficiently cooled and hardened that it may stand alone without the support of forms. "Rigging" also includes, in many or most cases, signalling to the operator of the crane (used to lift forms into place) that the forms are secured for elevation into place where they are to be taken, and that the form after elevation has been unsecured from the crane mechanism.

2. Defendants Washington State Council and Columbia River Valley District Council of Carpenters were not engaged in the activities complained of in the complaint and may be dismissed from this action without prejudice and without costs.

3. Plaintiff C. J. Montag & Sons, Inc., is a corporation organized under the laws of the State of Washington, with its principal place of business at Seattle, Washington; plaintiff Carl M. Halvorson, Inc., is a corporation organized under the laws of the State of Oregon, with its principal place of business at Portland, Oregon; plaintiff Austin Construction Co. is a corporation organized under the laws of the State of Washington, with its principal place of business at Seattle, Washington; plaintiff Babler Bros., Inc. is a corporation organized under the laws of the State of Oregon; and plaintiff McLaughlin, Inc. is a corporation organized under the laws of Montana, with its principal place of business at Great Falls, Montana. All of the plaintiffs, whether or not organized under the laws of the State of Washington, are qualified to do business in said state, and have paid all license fees and taxes due and owing to said state.

4. At all times material hereto, plaintiffs were joined together by contract dated as of January 4, 1957, in a common or joint venture for the construction of a dam on the Snake River in Walla Walla County, State of Washington, generally known as the "Ice Harbor Dam Project," hereafter for brevity sometimes called the "Project," for the United States Department of the Army, Corps of Engineers, pursu-

ant to a contract between plaintiff and the United States Department of the Army, Corps of Engineers, numbered DA-45-164-CIVENG-57-62. The Snake River is a navigable interstate river and a part of the Columbia River system. The construction of the Ice Harbor Dam in which plaintiffs were and at all times material have been engaged, is a part of a comprehensive plan for the development of the Columbia River and its tributaries in the States of Montana, Idaho, Washington and Oregon in the control of floods, the increase of navigation, and the production of electric power for industrial and domestic use in said states. Construction of the phase of said Ice Harbor Dam called for by the above-entitled contract was begun by plaintiffs on or about January 28, 1957, and was completed in the month of February, 1959. During the course of such construction, plaintiffs have used materials, equipment and supplies in a minimum aggregate amount of $17,000,000, of which more than 50 per cent, or $8,500,000, was purchased outside the State of Washington and brought to the Ice Harbor Dam Project for use therein.

5. The Carpenters International is, and at all times herein mentioned was, a labor organization engaged in directing, representing, and acting for its members and local unions in the State of Washington and other states and territories of the United States, as prescribed by its Constitution and Laws. Local 1849 is, and at all times herein mentioned was, a labor organization chartered by and affiliated with defendant International, with its headquarters in Pasco, Washing-

ton, and is engaged in representing its members in and about said city.

6. At no time material hereto was there an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing rigging work at the Ice Harbor Dam Project.

7. On or about April 26, 1957, plaintiffs, hereafter for brevity sometimes called "Montag," at or near the commencement of construction of the project, assigned the work of rigging certain forms, both metal and wood, on multipurpose cranes to the members of Local 14.

8. The assignment of rigging of forms to members of Local 14 was made by Montag as a result of written replies to inquiries addressed to contractors at other major dam projects in the Pacific Northwest, all of which replies stated in substance that the rigging of forms on multiple-purpose cranes at such projects had been assigned to members of the Iron Workers Union. The inquiries as to the assignment of such work by Montag and the consequent assignment were in accord with Montag's construction of the terms of the "procedural rules and regulations of the National Joint Board for Settlement of Jurisdictional Disputes, Building and Construction Industry," October 20, 1949, as amended to and including August 28, 1957, and particularly the "contractors' responsibility" provisions thereof.

9. Defendants Carpenters International and Local 1849, objected to the assignment by Montag of such

rigging work to members of Local 14. Defendants contended that such work belonged to the Carpenters under "Carpenter Agreement for Building, Highway and Heavy Construction Covering Eastern Washington and Northern Idaho 1956-1957-1958" to which plaintiff and defendant were parties, and that the appropriate precedent under the "procedural rules and regulations of the National Joint Board for Settlement of Jurisdictional Disputes, Building and Construction Industry," above cited, called for the area practice, and the practice followed by the contractors at the "Hanford Project" in the Pasco-Kennewick-Hanford area of Central Washington, where rigging of wooden forms was handled by members of the Carpenters Union, as shown by Job decisions of the Joint Board and letters from contractors.

10. On or about June 6, 1957, all of the members of Local 1849 employed by Montag on the project refused in the course of their employment to work on or otherwise handle wooden forms after the same had been rigged by members of Local 14. Said refusal was based on the claim of Local 1849 and its members that the rigging of wooden forms on the project was the work of the members of Local 1849, and the object of said refusal was to force and require Montag to assign said work to members of Local 1849, rather than to members of Local 14, to whom Montag had previously assigned such work.

11. On or about September 10, 1957, all of the members of Local 1849 employed by Montag on the project again refused in the course of their employment

to work on or otherwise handle wooden forms in the same circumstances, and with the same object as set forth in Paragraph 10 hereof.

12. In so refusing to work on or otherwise handle said wooden forms, said members of Local 1849 acted in concert and were induced and encouraged to so act by Local 1849 with the object set forth in Paragraphs 10 and 11 hereof.

13. Construction work on the project was halted from June 6 to June 22, 1957, and from September 10 to September 26, 1957. Plaintiff contends and defendants deny that the refusal of said members of Local 1849 to work on or otherwise handle said wooden forms, as set forth in Paragraphs 10 and 11 hereof, continued throughout said periods when work on the project was halted and was the proximate cause of said work stoppages. Said issue is segregated for separate and later hearing and determination by the court as a part of the damage issue, if the court shall hold that liability exists.

14. The National Joint Board for the Settlement of Jurisdictional Disputes undertook to resolve said dispute pursuant to Article 10 of the contract described in Paragraph 9 hereof, and on November 27, 1957, issued the following decision regarding said dispute over rigging work between Carpenters and the Iron Workers:

> "The hooking on, handling and signalling of all wood forms shall be assigned to carpenters. In other respects there is no basis to change the contractor's assignment. However, when not working on, hooking on, handling and signalling operations

> the trade shall proceed with other work as assigned by contractor."

15. At the time such decision was issued, plaintiffs had assigned all rigging work on multipurpose cranes, including the rigging of wooden forms, to the Iron Workers. Thereafter plaintiffs made no change in such assignment and refused to place into effect said Board decision.

PLAINTIFFS' CONTENTIONS

1. Defendant Carpenters International induced and encouraged Local 1849 and its members to so refuse to handle said wooden forms with the object set forth in Paragraphs 10 and 11 hereof.

2. Said conduct of defendants was in violation of Section 303(a)(4) of the Act, and actionable under Section 303(b) thereof, and defendants are liable to plaintiffs for the damages caused thereby.

DEFENDANTS' CONTENTIONS

1. Defendant International Brotherhood of Carpenters and Joiners of America is not liable for the reason that the unlawful acts claimed against Local 1849 cannot be construed to impose liability upon said defendant in the absence of a showing that said defendant participated with said Local in any of plaintiffs' claimed violations of the statute.

2. The plaintiffs, as parties by contract entitled "Carpenter Agreement for Building, Highway and Heavy Construction Covering Eastern Washington and Northern Idaho 1956-1957-1958," were obligated

to follow and comply with the Procedural Rules and Regulations of the National Joint Board for Settlement of Jurisdictional Disputes, and were thus bound to assign the disputed work to members of the defendant Local 1849 of the United Brotherhood of Carpenters and Joiners.

3. Defendant Local 1849 is not liable because the breach of contract by plaintiffs set out in Contention No. 2 legally justifies the action of said Local and its members to refuse to work for the plaintiffs.

4. Defendants have a constitutional right to cease work for any reason, which cannot be impaired, restricted or prohibited by statute.

5. Defendants contend that said decision in Paragraph 14 hereof was a valid and binding determination of the dispute, and required plaintiffs to reassign such work to the members of Local 1849, and that plaintiffs' failure to do so entitles defendants to recover damages based upon the collective bargaining contract described in Paragraph 9 and measured by the wages which otherwise would have been earned by members of Local 1849 if such work had been so assigned.

ISSUE OF FACT

Did defendant Carpenters International induce and encourage Local 1849 and its members to refuse to handle wooden forms with the object set forth in Paragraphs 10 and 11 hereof?

ISSUE OF LAW

As recited in the respective parties' contentions.

EXHIBITS

The exhibits on the list hereto attached were produced and marked and may be received in evidence if otherwise admissible, without further authentication, it being admitted that each is what it purports to be.

IT IS HEREBY ORDERED that the foregoing constitutes the pretrial order in the above-entitled cause, which shall not be amended except by consent of the parties or by order of the court to prevent manifest injustice.

Dated this 30th day of June, 1960.

WILLIAM J. LINDBERG,
United States District Judge

EXHIBITS

Exhibit No.

1. Collective bargaining agreement.
2. Plan for settling jurisdictional disputes.
3. Procedural rules and regulations of the National Joint Board.
4. Deposition of H. H. Brown.
5. Deposition of L. J. Hiller.
6. Deposition of W. H. Hankins.
7. Deposition of George Holland.
8. Deposition of Sam Pickel.
9. Deposition of Richard James Mitchell.
10. Constitution and By-Laws of International Brotherhood of Carpenters and Joiners of America (AFL-CIO).
11. Minutes of meeting June 20, 1957.
12. Night letter from Sam C. Guess to M. A. Hutcheson, dated March 20, 1957.
13. Night letter from Sam C. Guess to John H. Lyons, dated March 20, 1957.
14. Telegram from J. H. Lyons to Sam C. Guess, dated March 22, 1957.
15. Telegram from M. A. Hutcheson to Sam Guess, dated March 21, 1957.
16. Telegram from M. A. Hutcheson to Sam Guess, dated March 22, 1957.
17. Sam Guess' memorandum as to persons present at meeting on March 28, 1957.
18. Montag memo re work assignments dated March 27, 1957.
19. Night letter from S. C. Guess to M. A. Hutcheson, dated April 2, 1957.

Exhibit No.

20. Telegram from M. A. Hutcheson to Sam Guess, dated April 3, 1957.

21. Letter from John T. Dunlop to M. A. Hutcheson and J. H. Lyons, dated April 3, 1957.

22. Letter from Sam C. Guess to H. H. Brown, dated April 4, 1957.

23. Telegram from Sam C. Guess to M. A. Hutcheson, dated April 4, 1957.

24. Letter from John T. Dunlop to M. A. Hutcheson and J. H. Lyons, dated April 9, 1957.

25. Letter from H. H. Brown to Montag, dated April 26, 1957.

26. Assignment of work from Montag directed To Whom It May Concern, dated April 26, 1957.

27. Telegram from Montag to John T. Dunlop, dated June 3, 1957.

28. Telegram from Montag to John T. Dunlop, dated June 6, 1957.

29.* Telegram to L. J. Hiller from M. A. Hutcheson, dated June 10, 1957.

30.* Telegram from L. J. Hiller to M. A. Hutcheson, dated June 12, 1957.

31. Telegram from Sam C. Guess to John Dunlop, dated June 12, 1957.

32. Letter from John T. Dunlop to M. A. Hutcheson and J. H. Lyons, dated June 13, 1957.

33. Letter from Richard W. Axtell to H. H. Brown, dated June 13, 1957.

34. Telegram from Sam C. Guess to John T. Dunlop, dated June 18, 1957.

35. Telegram from J. H. Lyons to John T. Dunlop, dated June 18, 1957.

Exhibit No.

36. Letter from John T. Dunlop to M. A. Hutcheson and Montag-Halvorson-Cascade Austin & Associates, dated June 19, 1957.

37.* Telegram from M. A. Hutcheson to L. J. Hiller, dated June 19, 1957.

38.* Memorandum dated June 20, 1957, signed by George Holland and Lyle Hiller.

39. Telegram from John T. Dunlop to Sam C. Guess, dated June 20, 1957.

39-a. Telegram from John T. Dunlop to Montag-Halvorson-Cascade Austin & Associates, dated June 20, 1957.

40.* Letter from L. J. Hiller to M. A. Hutcheson, dated June 22, 1957.

41.* Letter from Montag to To Whom It May Concern, dated June 24, 1957.

42.* Telegram from M. A. Hutcheson to W. H. Hankins, dated August 22, 1957.

43. Telegram from M. A. Hutcheson to L. J. Hiller, dated August 26, 1957.

44.* Telegram from M. A. Hutcheson to J. H. Lyons, dated August 29, 1957.

45.* Telegram from M. A. Hutcheson to L. J. Hiller, dated August 30, 1957.

46. Telegram from Sam C. Guess to Dunlop, dated September 5, 1957.

47.* Telegram from W. H. Hankins to M. A. Hutcheson, dated September 5, 1957.

48.* Telegram from J. H. Lyons to M. A. Hutcheson, dated September 10, 1957.

49.* Telegram from J. H. Lyons to M. A. Hutcheson, dated September 10, 1957.

50.* Night letter from L. J. Hiller to M. A. Hutcheson, dated September 15, 1957.

Exhibit No.

51.* Telegram from R. J. Mitchell to M. A. Hutcheson, dated September 17, 1957.

52. Telegram from M. A. Hutcheson to National Joint Board, dated September 18, 1957.

53.* Telegram from M. A. Hutcheson to J. H. Lyons, dated September 18, 1957.

54.* Telegram from J. H. Lyons to George H. Holland, dated September 19, 1957.

55.* Telegram from M. A. Hutcheson to L. J. Hiller, dated September 23, 1957.

56.* Telegram from W. H. Hankins and L. J. Hiller to H. H. Brown, dated September 24, 1957.

57.* Telegram from W. H. Hankins and L. J. Hiller to Montag, dated September 24, 1957.

58.* Telegram from W. H. Hankins and L. J. Hiller to M. A. Hutcheson, dated September 24, 1957.

APPENDIX II

29 U.S.C.A. Sec. 187(b)—(303(B)) (prior to the 1959 amendment.)

> "Whoever shall be injured in his business or property by reason or (sic) any violation of subsection (2) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

29 U.S.C.A. Sec. 187(a)(4)—(303(a)(4))

> "(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—
>
> "(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. . ."

29 U.S.C.A. Sec. 185(b)

> "(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose

activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

APPENDIX III

EXHIBITS

Exhibits 1 to 58 inclusive are described and their listing is attached to pretrial order in Montag No. 18875, at pages of the Clerk's Transcript Nos. 35, 36, 37.

The exhibits were actually agreed upon and it not clearly appearing whether the exhibits are appellees' or appellants', we shall state that exhibits 1 to 3 are identified and admitted at page 12 RT. Exhibits 4 through 9 were identified and admitted at page 13 RT. Exhibits 10 through 11 are identified and admitted at page 13 RT. Exhibits 12 through 58 are identified and admitted at page 14 RT. Exhibits 59 and 60 are identified at page 109 RT and admitted at page 110 RT.

Montag exhibits	Identified	Offered	Admitted
61	RT 334	RT 335	RT 335
62	RT 334	RT 335	RT 335
63	RT 502	RT 502	RT 503
64	RT 502	RT 502	RT 503
65	RT 234	RT 235	RT 235
66	RT 312	RT 313	RT 317
67	RT 506	RT 508	RT 508
68	RT 211	RT 213	RT 213
69	RT 211	RT 213	RT 213
70	RT 218	RT 219	RT 220
71	RT 218	RT 233	RT 233
72	RT 335	RT 335	RT 335

68-A	RT 496	RT 496	RT 497
68-B	RT 496	RT 496	RT 497
68-C	RT 608	RT 609	RT 609
73	RT 692-693	RT 692	RT 692
74	RT 770	RT 782	RT 782
75	RT 851	RT 854	RT 854
Holman exhibits	Identified	Offered	Admitted
1	RT 921	RT 921	RT 921
2	RT 926	RT 926	RT 930
3	RT 941	RT 942	RT 942
4	RT 1047	RT 1047	RT 1047
5	RT 1047	RT 1047	RT 1047
6	RT 1048	RT 1048	RT 1048
Appellants' exhibits Holman			
7	RT 1051	RT 1051	RT 1051
8	RT 1051	RT 1051	RT 1051
Curtis exhibits			
1	RT 954-955	RT 966	RT 966
2	RT 961-962	RT 966	RT 966
3	RT 961-962	RT 966	RT 966
4	RT 961-962	RT 966	RT 966
5	RT 991	RT 991	RT 991
Appellants' exhibits Curtis			
6	RT 1006-1007	RT 1007	RT 1008
7	RT 1006-1007	RT 1007	RT 1008